CCDLA
"Ready in the Defense of Liberty"
Founded in 1988

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March 7, 2011

Hon. Eric D. Coleman, Senator
Hon. Gerald Fox, III, House Representative
Chairmen, Judiciary Committee
Room 2500, Legislative Office Building
Hartford, CT 06106

Re: House Bill No. 6423
An Act Concerning Subpoenas For Property

Dear Chairmen and Committee Members:

The Connecticut Criminal Defense Lawyers Association ("CCDLA") is a statewide organization of approximately 350 attorneys, both private and public, who are dedicated to defending people accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally, and that those rights are not diminished. CCDLA also strives to improve legislative enactments that apply to the criminal justice system by either supporting or opposing bills such as House Bill No. 6423.

CCCDLA OPPOSES HOUSE BILL NO. 6423, AN ACT CONCERNING SUBPOENAS FOR PROPERTY

House Bill 6423 seeks to confer unnecessary powers onto the State's Attorneys Office in derogation of the privacy rights and liberty interests of Connecticut's citizens. Plainly, it is an end run around the fourth amendment requirement that law enforcement

establish probable cause before a court issues a search and seizure warrant. It essentially conscripts citizens to become agents of the State's Attorneys Office, forcing them to conduct the search and seizure *for* law enforcement and then compelling them to incriminate themselves. It ignores the reality that indigent citizens will get swept up in the dragnet, and have no means of asserting their rights because most would not pursue a motion to quash without a lawyer's assistance. The language of the Bill is vague, its terms are overly broad, and it vests powers in numerous State's Attorneys, basically guaranteeing disparate use of the subpoena power.

I. House Bill 6423 Violates the Fourth Amendment

Section 2 of House Bill 6423 enables the State's Attorney to subpoena property based on the State's Attorneys own determination that the property is merely *relevant* to the matter under investigation:

> Sec. 2. (NEW) (*Effective October 1, 2011*) In the investigation of conduct that would constitute the commission of a crime, a prosecuting official, in the performance of such official's duties during such investigation, may issue a subpoena to compel the production of property relevant to the matter under investigation.

See House Bill 6423, Section 2. The Bill provides for neither pre-issuance judicial oversight, nor the application of a reasonable standard that would protect the citizens of Connecticut from prosecutorial abuse of power.

The fourth and fourteenth amendments to the United States constitution and article first, sections 7 and 8 of the Connecticut constitution, require that law enforcement officials obtain a warrant supported by probable cause before they may

conduct a search and seizure.[1] House Bill 6423 circumvents this protection by giving the State's Attorneys Office the power to compel people to turn over whatever property it deems "relevant to the matter under investigation" without a prior judicial determination of probable cause, or any form of pre-issuance judicial oversight.

A. **The Division of Criminal Justice is different from all other state agencies with subpoena power because the Division investigates and prosecutes criminal, not civil, matters.**

The fact that various state agencies have the power to issue administrative/civil subpoenas in civil investigations, and are not subject to the same probable cause requirements applicable to search warrants, does not diminish the constitutional hurdle faced by House Bill 6423.

Administrative/civil subpoenas relate to civil investigations. Civil investigations do not have the potential to directly result in deprivation of a person's liberty; criminal investigations have that potential. Consequently, there is less at stake in civil investigations so courts apply more flexible standards in determining the reasonableness of administrative/civil subpoenas.[2]

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[1] *See New York v. Class,* 475 U.S. 106, 117, 89 L. Ed. 2d 81, 106 S. Ct. 960 (1986); *United States v. Karo,* 468 U.S. 705, 714-15, 82 L. Ed. 2d 530, 104 S. Ct. 3296 (1984); *United States v. Ventresca,* 380 U.S. 102, 105-106, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965).

[2] *See Abel v. United States,* 362 U.S. 217, 226, 4 L. Ed. 2d 668, 80 S. Ct. 683 (1960) ("The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts . . .The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.")

B. The subpoena power conferred by House Bill 6423 is not subject to grand jury oversight.

Grand jury subpoenas may be justified under the fourth amendment because the very *fact* of the grand jury and its purpose, effectively substitutes the protections of the fourth amendment.[3] "The most important function of the grand jury is not only to examine into the commission of crimes . . . . but 'to stand between the prosecution and the accused...'" *Hoffman v. United States,* 341 U.S. 479, 95 L. Ed. 1118, 71 S. Ct. 814 (1951), and to protect citizens from harassment and unfounded prosecution. *See e.g., Wood v. Georgia,* 370 U.S. 375, 390, [8 L. Ed. 2d 569, 82 S. Ct. 1364] (1962); *Hoffman v. United States,* 341 U.S. 479, 485, [95 L. Ed. 1118, 71 S. Ct. 814] (1951); *Ex parte Bain,* 121 U.S. 1, 11 [30 L. Ed. 849, 7 S. Ct. 781] (1887).

There are no such protections in House Bill 6423. The power conveyed by the Bill is not analogous to grand jury subpoena power because, under 6423, prosecutors are not subject to grand juror oversight; prosecutorial discretion under the bill is unfettered. Unlike a grand jury, the State's Attorneys office is not a neutral and detached body, and it has no duty to protect citizens from its *own* overreaching. Consequently, 6423 provides no substitute -akin to grand jury oversight- for fourth amendment protections.

[3] *See In re Criminal Investigation*, 754 P.2d 633, 659-666, 79 Utah Adv. Rep. 3 (1988) (Steward, J. dissenting).

II. House Bill 6423 Violates the Fifth Amendment.

As demonstrated herein, House Bill 6423 compels subjects of the subpoena to provide property (documents, etc.), the production of which may be self-incriminating: "Sec. 2 (c) Any subpoena issued pursuant to this section *shall compel the person to produce the property* at the office of the prosecuting official. . ." (Emphasis added.) See House Bill 6423, Section 2 (in relevant part).

House Bill 6423 implicates a person's privilege against self-incrimination because it requires the subject of the subpoena to produce property that could contain self-incriminating information (admissions, statements, etc.). House Bill 6423 provides for no warning, Miranda or otherwise, to the subject of the subpoena advising them that by turning over property he or she could be incriminating themselves and be subject to later prosecution. House Bill 6423 requires the subject of the subpoena to do more than merely remain quiet or decline to turn over property based on the fifth amendment protection; it imposes a burden on the subject to file a Motion to Quash in order to assert constitutional protections.

Many subpoena targets will not know how to file a Motion to Quash and will require counsel to do so. People with limited income caught in the snare of 6423 will have no remedy because they will be unable to hire counsel to assist them with a Motion to Quash. The Bill contains no provision for appointing counsel to those unable to afford one.

III. The Motion to Quash Provision Is Inadequate Protection Against Prosecutorial Overreaching.

Section 5 of House Bill 6423 allows the subject of a subpoena to file a motion to quash the subpoena:

> Sec. 5 (a) Whenever a subpoena has been issued to compel the production of property pursuant to section 2 of this act, the person summoned may file a motion to quash the subpoena. . .
> . . .
>
> (e) A judge may quash or modify any subpoena issued pursuant to sections 1 to 5, inclusive, of this act for just cause or in recognition of any privilege established under law.

See House Bill 6423, Section 5. The Motion to Quash is ill equipped to address the constitutional concerns raised herein and to combat prosecutorial abuses under the subpoena power. Citizens should not be required to take affirmative action to prevent the state from intruding on their privacy rights and liberty interests, and from compelling them to incriminate themselves. It is well settled that until a criminal charge is formally made, the state bears the burden of first establishing that its intrusion upon a citizen's liberty is lawful.[4] House Bill 6423 unfairly and unconstitutionally shifts that burden.

IV. Implementation of House Bill 6423 Will Overburden Courts.

Assuming that subjects of the investigative subpoena take advantage of the motion to quash provision, courts will be overburdened as these motions must be decided expeditiously. In order to keep dockets moving at an efficient pace, more judges and additional training will be required. In the present economy, it would be frivolous to adopt a bill that is neither constitutional nor necessary.

[4] *Davis v. Mississippi,* 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969).

V. House Bill 6423 Violates Conn. Gen. Stats. Sections 52-146c, 52-146d, 52-146e, 52-146k, 52-146q, and 52-146s.

House Bill 6423 contemplates subpoenaing privileged communications (documentary), between a patient and his/her psychiatrist or psychologist, battered women's counselor or rape crisis counselor, social worker, or any other professional counselor. Though the bill provides that "if any subpoena is issued pursuant to section 2 of this act for the production of the medical records, including psychiatric and substance abuse treatment records, of a person, the prosecuting official shall give written notice of the issuance of such subpoena to such person . . .[s]uch person shall have standing to file a motion to quash the subpoena in accordance with section 5 of this act," it directly conflicts with the statutorily established privileges articulated in Conn. Gen. Stats. Sections 52-146c, 52-146d, 52-146e, 52-146k, 52-146q, and 52-146s.

It would be unconscionable to require a psychiatric patient, or an individual in alcohol or drug counseling to appear in court to fight a criminal subpoena where no criminal charges have been lodged; the very act of appearing to quash the subpoena compels the subject to disclose otherwise privileged information (that he or she is actually a patient, or the beneficiary of counseling is privileged information under state and federal law).

VI. House Bill 6423 Is Broader Than Its Stated Objective.

House Bill 6423 exceeds its stated objective because it enables the State's Attorneys Office to subpoena records relevant to *any* criminal investigation, not only

those related to fraud. The Bill sets forth various "crimes" to which the subpoena power applies – many do involve fraud offenses; however, the Bill provides no protection for use of the offenses articulated in Section 1 as pretext for the State exercising investigative subpoena power to investigate non-enumerated offenses.

Under the Bill, a state's attorney would merely have to articulate that the property sought by the warrant was relevant to one of the many charges enumerated in section 1 -- this would enable the State's Attorney's Office to investigate *any* offense it wished by linking it to an enumerated offense. Whether the state's attorney actually brought charges pursuant to an enumerated offense is irrelevant, the prosecutor would merely have to justify the subpoenaed documents as relevant to a one of the enumerated offenses.

For example, a state's attorney may claim the purpose for exercising her investigative subpoena power is to investigate a larceny when really she is interested in investigating a run of the mill robbery, but because the enumerated offense of larceny is always charged in robbery cases, she can justify her use of the subpoena. Robbery is certainly not a fraud offense, and this is only one example of the predictable misuse of the subpoena power.

VII. House Bill 6423 Contains No Structure For Uniform Application Of Its Provisions.

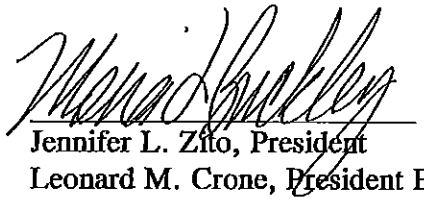
The Bill gives subpoena power to 15 different appointed state's attorneys, who in turn, will undoubtedly delegate power to various assistant state's attorneys, and numerous investigators, inspectors, and state police officers. Some State's Attorneys may abuse the subpoena power, others may not. The Bill provides no structure for

uniform application of its provisions, and its broad language ensures that the various state's attorneys will have differing views on which offenses they may prosecute under 6423, and the various vague definitions throughout the bill.

CONCLUSION

For the reasons stated herein, CCDLA opposes House Bill 6423.

Respectfully submitted,
ON BEHALF OF THE
CONNECTICUT CRIMINAL
DEFENSE LAWYERS
ASSOCIATION



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